

In the Matter of Arbitration

Between

VA Greater Los Angeles
Healthcare System, LAACC

And

AFGE, Local 2297
Sandra Lee, M.D., Grievant

DATE: Nov. 18 & 19, 2008

FMCS CASE #: 08-01626

GRIEVANT: Sandra Lee

BEFORE: David P. Beauvais, Arbitrator

APPEARANCES:

For the Veterans Administration: Maureen Ney, ESQ

For the AFGE Local 2297: Jacqueline Sims ESQ

PLACE OF HEARING: LAACC, 355 East Temple, Los Angeles, CA

AWARD: The grievance is denied in part and sustained in part. The Union failed to establish a past practice of 100% official time. However, the Agency cannot restrict the Grievant from using the official time available to her to represent other facilities within Local 2297's jurisdiction.

DATE OF AWARD: May 1, 2009

Arbitrator

INTRODUCTION

This Arbitration proceeding arises pursuant to the 1997 Master Agreement between the Department of Veterans Affairs (hereinafter the Agency or Employer) and the American Federation of Government Employees (hereinafter the AFGE or the Union). The undersigned was selected as Arbitrator in accordance with procedures set forth by the Federal Mediation and Conciliation Service. Pursuant to the party's agreement in Article 40, Section 2F of the Master Agreement, the Arbitrator's decision is final and binding.

The hearing was conducted on November 18 and 19, 2008, at the Los Angeles Ambulatory Care Center, 355 East Temple, Los Angeles, CA. The hearing commenced at 10:30 a.m. on November 18, and concluded at 4:45 p.m. on November 19, 2008. The hearing proceeded in an orderly manner. There was a full opportunity for the parties to submit evidence, and to examine and cross-examine witnesses. All witnesses testified under oath. The parties submitted one joint document (the Master Agreement), the Union submitted twenty-five (25) documents and the Agency submitted seven (7) documents into evidence. These documents were received and made part of the record.

The advocates fully and fairly represented their respective parties. Maureen Ney, Office of Regional Counsel, represented the Department of Veterans Affairs. Jacqueline Sims, Associate General Counsel, AFGE, represented the American Federation of Government Employees. There was a challenge to the procedural arbitrability of the dispute by the Agency, which is addressed in the award.

The parties submitted the matter on the basis of evidence presented at the hearing and through argument set forth in their respective post hearing briefs. It was agreed the briefs would be postmarked no later than January 26, 2009, and that the Arbitrator would exchange briefs for the parties once both were received. The parties subsequently sought an extension for submission of the briefs, which was approved by the Arbitrator. The Agency's brief was received on February 21, 2009 and the Union's brief was received on April 1, 2009, at which time the hearing record was closed. This opinion and award will serve as this arbitrator's final and binding decision in this dispute.

ISSUE

The parties could not agree to the exact wording in the issue statement. The parties agreed that the Arbitrator should fashion the issue statement following the submission of evidence and argument of the case. After reviewing the evidence of record and the briefs submitted by the parties, the Arbitrator frames the issue as follows:

“Did the Agency violate the master agreement, any local agreement, established past practice, or the July 17, 2003 Memorandum of Understanding Ground Rules when it denied official time to Sandra Lee, M.D., President of Local 2297, to travel to Las Vegas Nevada on May 22, July 18 and July 19 and August 3, 2007, to perform representational duties which included grievance meetings and a meeting with the Director of the VASNHS?

Is the Grievant entitled to 100% official time?

If so, what is the proper remedy?”

BACKGROUND

The Grievant, Dr. Sandra Lee, (hereinafter the Grievant or Dr. Lee) is a Staff Physician employed by the Veterans Administration Los Angeles Ambulatory Care Center. At the time of the incidents giving rise to this grievance Dr. Lee had been employed at the LAACC for approximately eighteen years.

The Grievant is currently the President of AFGE Local 2297. Prior to her election as President in 2007, Dr. Lee served a three year term as Vice President, and had also acted as a Shop Steward since about 2001. Local 2297 represents a number of VA facilities in the Southern California area. Additionally, Local 2297 is the recognized representative for VA facilities in the Las Vegas Nevada area (hereafter referred to as VA SNHS).

The Grievant’s immediate supervisor was Dr. Karl Tso. Dr. Tso is the lead physician for ambulatory services at the VA LAACC. In May 2007, Dr. Lee asked for official time to travel to VA SNHS to perform representational duties. The date requested was May 22, 2007. The request was denied by

Dr. Tso, who referred the Grievant to the Labor Relations Department for an explanation.

The Grievant discussed the matter with Labor Relations Manager Mary Moore. According to Dr. Lee (Ms Moore did not testify during the hearing) the issue was discussed several times. Ms Moore took the position that the Nevada units were a separate bargaining unit, and the Grievant was therefore not entitled to official time to travel to and from or perform representational duties at facilities in Nevada. Ms Moore suggested the Grievant take leave time to cover any absence to travel to Nevada, and that the time could be changed to official time if it was determined the Grievant was entitled to official time at a later date.

Subsequently, Dr. Lee requested official time to travel to Nevada on July 18 and July 19 and August 3, 2007. In both cases the Grievant was denied official time and used annual leave. After the denial of official time on August 3rd, the Grievant filed a formal grievance on August 17, 2007. The grievance was not resolved through the grievance procedure, and the Union certified the grievance for arbitration on or about October 5, 2007.

POSITION OF THE PARTIES

AFGE

The Union argues that this case has two main components. First, the Union asserts that the VA SNHS is part of the bargaining unit represented by Local 2297. As such, the Union is entitled to certify the representatives for bargaining and representation purposes at VA SNHS, including the President of Local 2297. Since Local 2297 is the exclusive bargaining representative for facilities located in both Southern California and Southern Nevada, the President of the Local may be elected from any facility within the bargaining unit, and may represent any facility within the bargaining unit, regardless of the physical location.

Secondly, the Union argues that established past practice at the VA LAACC and VA SNHS entitles the Grievant to 100% official time. The Union points to the testimony of Lula May Jones, who testified that she received 100% official time from 1994 to 1996 while President of Local 2297 (TR1, page

38). Ms Jones retired in 1996, and continued to serve as President until 2003, essentially serving as a full time President during that time.

Further, the Union also points to the fact that following Ms Jones retirement as President of Local 2297 in 2003, Les Mitchell, a bargaining unit employee from VA SNHS served as President from 2004 to 2007, and received 100% official time. The Union asserts that these facts establish a past practice of 100% official time granted to the President of Local 2297

Regarding the timeliness issue raised by the Agency at hearing, the Union argues that the Agency has essentially waived its right to any claim of arbitrability due to timeliness. The Union points to the language in Article 42, Section 4 (Jurisdiction) of the Master Agreement, which states:

“If either party considers a grievance nongrievable or nonarbitrable, the original grievance will be considered amended to include this issue. The Department must assert any claim of nongrievability or nonarbitrability no later than the Step 3 decision.”

Veterans Administration

The Agency initially argues that the grievance is untimely filed, and is therefore not arbitrable. In the alternative, should the Arbitrator find the grievance itself is arbitrable, the Agency argues that any remedy should only apply to the August 3, 2007 date, as the prior dates in May and July of 2007 are clearly beyond the 30 day time limit for filing a grievance set forth in Article 42, Section 7 of the Master Agreement.

The Agency also argues that the Master Agreement sets forth clear and concise language regarding the amount and use of official time by local Union officials. The Agency cites Article 45, Section 10 (Local) of the Master Agreement:

“Each VHA local is entitled to at least one Union official with no less than 40% official times. Each VBA and NCS local is entitled to at least one Union official with no less than 25% official time. When a local represents more than one administration or facility, a Union representative at each administration or facility is entitled to the designated minimum amount of official time. In the case of integrated facilities, a Union representative at

each pre-integration facility is also entitled to at least the designated amount of minimum time.

The Agency argues that the intent of this section is clear and unambiguous; the parties have bargained and agreed that the Union is entitled to designate an official who shall receive at least 40% official time at each facility, rather than a local representative using official time to cover both facilities.

The Agency also asserts that the Union has failed to establish an ongoing past practice of 100% official time for a Union Representative at the VA LAACC. The Agency points out that any practice of granting a Union representative at VA LAACC 100% official time ceased in 1996 when Ms Jones retired. The fact that Ms Jones continued as President of the Local is irrelevant; since she was no longer an employee, the issue of official time was moot.

The Agency also argues that the election of Les Mitchell as President of Local 2297 in 2003 does not establish any binding past practice. The Agency emphasizes that despite the fact that Mr. Mitchell was on 100% official time during his tenure, he performed no representational duties at any VA GLAHS facilities; rather he designated all representational duties to Dr. Lee, who was then Vice President of the Local.

ANALYSIS AND DISCUSSION

The Arbitrator has carefully reviewed the evidence of record, the testimony of witnesses at hearing, and the post-hearing briefs submitted by both parties. The Arbitrator finds that the Union, has not established an ongoing past practice that would entitle the Grievant to 100% of official time. The Grievant is therefore entitled to the minimum 40% of official time, as provided in the Master Agreement under Article 45, Section 10, and the July 17, 2003 Memorandum of Understanding Ground Rules, Section X.. Supplemental and Official Time Negotiations.

However, the Agency may not restrict the Grievant in the use of said time; she is entitled to use official time for representational duties at any facility within the jurisdiction of Local 2297, including facilities in Nevada if she has not otherwise used the time. The Arbitrator's reasoning and analysis follows.

Procedural Arbitrability Issue Raised by the Agency

The Agency raised a procedural argument at hearing regarding the arbitrability of the grievance. The Agency argued that this grievance involved three separate and discrete incidents; May 22, July 18/19 and August 3, 2007. Since the dates in May and July were well past the 30 day time limit to file a grievance, as set forth in Article 42, Section 7, the Agency contends that the grievance was untimely filed for those dates, and no remedy should be granted if a violation is found by the Arbitrator.

The Agency argument in this regard is unpersuasive. As the Union points out, there is specific language in the Master Agreement that addresses the issue of arbitrability. Article 42, Section 7 states in relevant part:

“The Department must assert any claim of nongrievability or nonarbitrability no later than the Step 3 decision.”

The Step 3 grievance filed by the Union on August 17, 2009 (Union Ex. 20) clearly identifies May 22, July 18 and 19 and August 3, 2007 as the dates that Dr. Lee was denied official time. The Step 3 reply, dated October 4, 2007, and signed by Robert Gutierrez, Special Assistant to the Director (Union Ex. 21), does not address the timeliness issue in any manner. Given the clear and unambiguous language cited above, the Arbitrator concludes that the Agency failed to introduce and preserve the timeliness issue during the grievance procedure, and is barred from introducing the issue for the first time at hearing.

Established Past Practice Issue

Both parties presented testimony and provided argument regarding the amount of time the Grievant was entitled to as a matter of practice. Although this issue is secondary, it is a critical element to the case of both parties. Put simply, if the Grievant is entitled to 100% official time, then the underlying issue becomes moot, as the Agency concedes in their brief on page 5:

“Additionally, Mr. Mitchell received 100% official time and therefore would not be required to request it to perform representational duties.”

However, the Arbitrator finds insufficient evidence to establish an ongoing past practice of 100% official time for a representative (and specifically the Local President) at VA LAACC.

In order to establish a binding past practice, three elements must be present. First, the practice must be unequivocal. Second, the practice must be clearly pronounced and acted upon. Third, the practice must be accepted by both parties over a reasonable period of time.

The Union established a practice of 100% official time for the Local President beginning in 1994. However, little if any, evidence was offered by either party regarding the circumstance that existed from 1994 to 1996 that led to granting Ms Jones 100% official time. Moreover, and perhaps more importantly, Ms Jones retired in 1996, but continued to serve as President of Local 2297 until 2003. In 1997, a new Master Agreement came into effect. The issue of official time was not negotiated at the local level following the implementation of the 1997 Master Agreement, nor was any past practice continued because Ms Jones was no longer an employee.

Following Ms Jones retirement as President of Local 2297 in December 2003, Les Mitchell, an employee at the VA SNHS served as President. Based on the testimony presented at hearing, Mr. Mitchell was granted 100% official time. However, the decision to grant 100% official time appears to have been the unilateral decision of the officials at the VA SNHS, and based on conditions there. The Agency established that Mr. Mitchell assigned all correspondence regarding representational duties to be sent to then Executive Vice President Lee (Agency Exhibit 6). There was no evidence that Mr. Mitchell ever performed any representational duties at any VA GLAHS facilities during his term as Local 2297 President.

Upon her election as President of Local 2297 in 2007, Dr. Lee attempted to obtain 100% official time. In a letter dated April 12, 2007 (Agency Exhibit 8, page 1) the Grievant cited Mr. Mitchell’s use of 100% official time as a past practice and requested that she be granted 100% official time effective immediately. In her request, the Grievant observed:

“The ground rules for negotiation of the Master Agreement between AFGE and VA in 2003 specified that official time already in existence will not be reduced while the negotiation of the Master Agreement is ongoing.”

Dr. Lee’s attempt to secure 100% official time was promptly and firmly rebuffed in a letter dated April 27, 2007 by Harold D. Goings Jr., Acting Director of Human Relations for GLAHS (Agency Exhibit 8, page 2). In his response, Mr. Goings made two points that are relevant to the past practice issue:

“No past practice at the VA Southern Nevada Healthcare System(SNHC) and no agreements between management of SNHC and the American Federation of Government Employees (AFGE) have any application or relevance to the VA Greater Los Angeles Healthcare System (GLA).”

And:

“Even if such past practices or agreements did have any application or relevance to GLA, when the Memorandum of Understanding Ground Rules was negotiated between Department of Veterans Affairs and AFGE on July 17, 2003, Mr. Les Mitchell was not the President of Local 2297. The President at that time was not a VA employee. So, whatever amount of official time Mr. Mitchell’s had at that time would have been irrelevant.”

The exact date of Mr. Mitchell’s election as local 2297 was not established at hearing. However, in his February 25, 2004 letter to the Acting Director of VA GLAHS directing all correspondence to Dr. Lee Mr. Mitchell states that he is the “newly elected President of American Federation of Government Employees Local 2297. Moreover, Ms Jones testified that Mr. Mitchell was President of Local 2297 from January 2004 to January 2007 (11/18/08 Transcript, page 87). The Arbitrator therefore concludes that Mr. Goings statement is accurate.

In summary, the Union failed to establish an ongoing and accepted past practice of 100% official time being used by the Local 2297 President prior to the implementation of the negotiated Memorandum of Understanding Ground Rules on July 17, 2003. In the absence of such an established binding past practice, the Grievant is entitled to 40% official time as provided in the MOU Ground Rules (Union Exhibit 3, page 4).

Representational Time

The Arbitrator's conclusion regarding the issue of 100% official time does not answer the question regarding the Grievant's request for official time to perform representational duties at VA SNHS. As noted above, the Grievant is entitled to 40% official time at present, and that time may be subject to modification at a future date during local negotiations on the subject.

The Union established that Local 2297 is the certified representative for employees at both VA GLAHS and VA SNHS. The evidence also established that a representative at VA SNHS is currently granted 100% official time. Never the less, there may be occasions when it is appropriate and/or necessary for the President of Local 2297 to perform representational duties at VA SNHS.

The question is whether the Grievant is entitled to use official time for representational duties in Southern Nevada. The Arbitrator concludes that the Grievant is entitled to official time, up to the 40% allotted by the MOU Ground Rules to travel to and from VA SNHS and to perform representational duties there.

The Agency argues that since at least one representative is allotted official time at each facility, the Grievant is not entitled to use official time for representational duties at VA SNHS. The Agency also argues that this is so because VA SNHS is a separate and distinct bargaining unit from VA GLAHS.

This argument is neither convincing nor consistent. If Dr. Lee is not permitted official time to travel and perform representational duties at VA SNHS because another employee at that facility is already granted official time, the same should be true for facilities within VA GLAHS. Consider the following exchange between the Arbitrator and John Beard near the close of his testimony (11/18/08 transcript, page 135):

Arbitrator Beauvais: All right. Doctor Lee testified that she had been—if I recall, she said on more than one occasion had gone to San Luis Obispo to represent employees.

The Witness: Yes.

Arbitrator Beauvais: How is that different than going to Las Vegas?

The Witness: San Luis Obispo, Santa Maria, Bakersfield, all those are part of Greater Los Angeles Healthcare System, and Local 2297 represents all physician assistants throughout the Greater Los Angeles Healthcare System. That is considered one station. Las Vegas is separate from Greater Los Angeles.

Arbitrator Beauvais: Okay.

The Witness: It's a different station.

However, it should be noted that the VA GLAHS came about as the result of unilateral action by the Agency. Lula May Jones' un rebutted testimony established that Local 2297 originally represented just the Los Angeles Outpatient facility. Over the years the Veterans Administration made unilateral changes and mergers that led to the current VA GLAHS.

Based on the testimony and the evidence, the Arbitrator concludes that the distinction made by the Agency between facilities included under VA GLAHS and VA SNHS is unilateral and artificial. Local 2297 represents bargaining unit employees in both systems. If the President can be granted official time to travel to Bakersfield or San Luis Obispo to represent bargaining unit employees, it is neither logical nor reasonable that she should be denied official time (if available within the current 40%) to represent bargaining unit employees in Las Vegas.

Additionally, the Arbitrator notes that support for the Union's position can be found in Article 45, Section 1 of the Master Agreement, which states in relevant part:

"They (the parties) further recognize that this consolidated unit is very large and complex and requires Union coordination of its representational activities at several levels. Thus official time shall be granted in amounts specified by this Agreement or otherwise negotiated for the purpose of:

- A. Handling grievances and other complaints*
- B. Handling other representational functions, and*
- C. Appropriate lobbying functions.*

This language certainly contemplates the rather knotty situation at issue in this case, and makes it clear that official time may be used for representational purposes under with the only limitation being the amount of time specified in the agreement or otherwise negotiated.

The Arbitrator therefore directs that if Dr. Lee had official time available on May 22, July 18 and 19, and August 3, 2007, then that official time should be granted, up to eight (8) hours per day, and her annual leave restored. There was no testimony or evidence presented by either party regarding how official time is accrued or tracked. Therefore, it will up to the parties to make a good faith effort to determine how much, if any, official time was available to the Grievant for those dates. The Arbitrator will retain jurisdiction regarding remedy for a period of sixty (60) days in the event the parties are unable to resolve the issue or need clarification to resolve the issue.

One other note; at some future date a new Master Agreement will be finalized, and the parties may subsequently bargain on the issue of official time at the local level. Nothing in this award should be construed as precedent or used as argument during local negotiations or any ensuing arbitration regarding the amount of official time needed at the local level. The issues in this grievance were whether the Grievant was entitled to 100% official time due to an existing past practice, and whether she was entitled to use official time to perform representational duties at VA SNHS.

Award

The grievance is denied in part and sustained in part. The Union failed to establish a past practice of 100% official time. However, the Agency cannot restrict the Grievant from using the official time available to her to represent other facilities within Local 2297's jurisdiction.

DATE: May 1, 2009

Arbitrator

